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23 UNITED STATES DISTRICT COURT
24 NORTHERN DISTRICT OF CALIFORNIA
25 SAN FRANCISCO DIVISION

26 MONEYCAT, LTD.,

27 Plaintiff

28 v.

PAYPAL, INC.,

Defendant

CASE NO. 5:14-CV-02490-JST

**MONEYCAT, LTD.'S
ADMINISTRATIVE MOTION TO
STRIKE AS IMPROPER PAYPAL'S
RENEWED MOTION TO STAY [D.I. 134]
AND SCHEDULE THE HEARING DATE
FOR THE EXISTING MOTION FOR
THE SAME DATE AS THE CMC**

JURY TRIAL DEMANDED

1 Plaintiff MoneyCat, Ltd. (“MoneyCat”) submits this administrative motion (1) to strike
2 as improper PayPal’s Renewed Notice of Motion and Motion to Stay Pending Covered Business
3 Method (CBM) Review Under Section 18(B) of the Leahy-Smith America Invents Act [D.I. 134]
4 and (2) to move the scheduled September 18, 2014 hearing for that motion to a date after the
5 U.S. Patent and Trademark Office (PTO) issues its decision on the CBM Petitions (expected by
6 September 26, 2014) and to the same date as the Case Management Conference (CMC) in this
7 action. MoneyCat respectfully submits that the parties should be ordered to file a supplemental
8 brief, not exceeding 5-pages, to the previous briefing on the motion to stay no later than one
9 week prior to the CMC. If this administrative motion is not granted, MoneyCat’s opposition is
10 currently due on August 8, 2014.

11 On July 29, 2014, Counsel for MoneyCat sought to address the issues raised herein with
12 PayPal’s counsel and sought PayPal’s position by July 30, 2014. However, no response of any
13 kind (written or oral) has been received from PayPal. See, Declaration of Howard Wisnia in
14 Support of MoneyCat’s Administrative Motion (hereinafter “Wisnia Decl.”), ¶ 8, Exh. 4.

15 **A. Background**

16 This patent infringement action was originally filed on July 30, 2013 in the United States
17 District Court for the District of Delaware. [D.I. 1]. A scheduling order was entered [D.I. 23]
18 and extensive document and written discovery, including exchange of infringement and
19 invalidity contentions took place. The deadline for substantial completion of all document
20 production was April 14, 2014. The parties completed the claim construction meet and confer
21 process and filed their joint claim construction chart [D.I. 62] and opening claim construction
22 briefs. [D.I. 84-88].

23 Pursuant to PayPal’s motion, this action was transferred to this Court on May 15, 2014
24 [D.I. 96-97]. The Delaware District Court recognized that PayPal may be seeking to delay the
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1 action and noted that discovery would remain open during the transfer process. [D.I. 96 at p. 6,
 2 fn. 4 & p. 13].

3 Prior to the transfer order, PayPal had filed a motion to stay the action in view of the
 4 CBM Petitions.¹ [D.I. 58]. Briefing on that motion was fully completed, including a sur-reply,
 5 by May 7, 2014. [D.I. 58-60, 68-74, 80-82]. The Delaware District Court did not act on that
 6 motion and it remains pending. Nonetheless, since the transfer, PayPal has failed to timely
 7 provide discovery and has effectively granted itself a stay.

8 Upon transfer to this district, the case was assigned to Magistrate Judge Grewal and the
 9 CMC was set for October 7, 2014. [D.I. 100]. This date was shortly advanced to July 8, 2014
 10 [D.I. 103]. The case was reassigned, however, to Judge Tigar on June 27, 2014, [D.I. 128] and a
 11 new CMC date was set for October 1, 2014. [D.I. 131].

12 **B. PayPal's Renewed Motion is Procedurally Improper**

13 PayPal's Motion is an unauthorized attempt to file an improper third brief in support of
 14 its motion to stay, without prior Court approval in violation of Civil LR 7-3(d). Moreover, it
 15 places undue burden and expense on MoneyCat to brief, again, the same issues.

16 Civil LR 7-3(d) provides that once briefing has been completed, "no additional
 17 memoranda, papers or letters may be filed without prior Court approval" except in certain
 18 narrow circumstances not applicable here. PayPal has not withdrawn its prior motion or sought
 19 leave to submit additional briefing. If anything, PayPal should have simply re-noticed its
 20 previously pending motion, without a new memorandum of points and authorities, for a new date
 21 convenient for the Court and both parties. PayPal did not provide any advance notice of its filing
 22 of the new motion. Wisnia Decl. ¶ 7.

23

24 ¹ The CBM Petitions assert that the patents-in-suit are invalid as obvious under 35 U.S.C. § 103.
 25 As explained in MoneyCat's opposition to the motion to stay [D.I. 68 at pp. 1-6] the Petitions
 26 constitute PayPal's seventh, eighth and ninth attempts to invalidate the MoneyCat patents in the
 U.S.P.T.O., with each previous attempt being a failure.

1 Not only does PayPal's action violate the local rules, it is inconsistent with the procedure
 2 the parties had been working on. During the Rule 26(f) telephonic meet-and-confer on June 16,
 3 2014, the parties discussed the possibility of seeking leave from the Court to file additional, 5-
 4 page submissions relating to PayPal's motion to stay. Wisnia Decl. ¶ 1 & 2. There was no
 5 suggestion of an entire new round of briefing. *Id.*

6 **C. Fairness and Common Sense Dictates Moving the Scheduled Hearing Date and
 7 Briefing**

8 Given the advanced stage of this case prior to transfer, on July 8, 2014, MoneyCat's
 9 counsel emailed PayPal's counsel expressing interest in asking this Court to move the CMC date
 10 of October 1, 2014 up to the first available date in July or August. Wisnia Decl., ¶ 3, Exh. 3. On
 11 July 9, 2014, MoneyCat's counsel and PayPal's counsel spoke on the phone, wherein PayPal's
 12 counsel expressed interest in maintaining the October 1, 2014 CMC date in view of the
 13 September 26, 2014 deadline for the PTO to decide whether to grant the CBM petitions. Wisnia
 14 Decl., ¶ 4. PayPal's counsel believed this decision may influence the Court's decision on
 15 whether to stay the action and stated that the parties and Court would benefit from having that
 16 decision. PayPal's counsel did not suggest that it would file a new motion to stay set for a date
 17 prior to the CBM decision date as this would be at odds with its position. *Id.*

18 MoneyCat's counsel indicated that it would check the Court's schedule for an earlier
 19 CMC date. MoneyCat's counsel spoke with the Deputy Clerk on July 10, 2014, learning that the
 20 Court's first availability for a CMC was August 20, 2014, during which the Court already had
 21 numerous CMCs scheduled. *Id.* at ¶ 5.

22 On July 16, 2014, during a telephonic discovery-related meet-and-confer, MoneyCat's
 23 counsel informed PayPal's counsel of the Court's availability for a CMC. *Id.* That same day,
 24 MoneyCat's counsel, Brad Scheller telephoned PayPal's counsel, Jared Bobrow, to discuss the
 25
 26

1 conversation with the Deputy Clerk further. Mr. Scheller left a message with Mr. Bobrow's
 2 assistant to please return his call. Mr. Scheller did not receive a return message. *Id.* at ¶ 6.

3 As explained in MoneyCat's opposition [D.I. 68], PayPal's motion to stay should be
 4 denied for a variety of reasons. In any event, the motion is entirely premature until the USPTO
 5 acts on the petitions. As Federal Circuit Judge Bryson, sitting by designation in the district
 6 court, recently recognized "[s]ince the enactment of the America Invents Act ("AIA"), district
 7 courts have encountered a flood of stay requests pending . . . CBM review. . . . [T]he majority of
 8 courts that have addressed the issue have postponed ruling on stay requests or have denied stay
 9 requests when the PTAB has not yet acted on the petition for review." *Loyalty Conversion Sys,*
 10 *Corp. v. American Air., Inc.*, 2:13-CV-655, Dkt. No. 112 at 2 (E.D. Tex. July 29, 2014)²
 11 (collecting cases).

12 **D. Conclusion**

13 Accordingly, MoneyCat respectfully submits that the motion to stay should be set for the
 14 same day as the CMC, which is currently set for October 1, 2014 (i.e., after the USPTO's
 15 deadline to decide whether to grant the CBM petitions). PayPal's latest briefing should be struck

16 and the parties ordered to submit updates to their previous briefing of no more than 5
 17 pages no later than one week prior to the CMC.

26 ² Attached as Exhibit 5 to Wisnia Decl.

1 Dated July 31, 2014

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4 */s/ Howard N. Wisnia*

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